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8 ALPHAMED PHARMACEUTICALS CORP.

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10 UNITED STATES DISTRICT COURT  
11  
12 NORTHERN DISTRICT OF CALIFORNIA

13 ALPHAMED PHARMACEUTICALS  
14 CORP.,

Case No. C-08-01279-SI

15 NOTICE OF APPEAL TO THE UNITED  
16 STATES COURT OF APPEALS FOR THE  
17 NINTH CIRCUIT

The Honorable Susan Illston

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19 ARRIVA PHARMACEUTICALS, INC.,

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21 Debtor-Appellee.

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1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that Claimant-Appellant ALPHAMED  
3 PHARMACEUTICALS CORP. ("Claimant-Appellant") hereby appeals from the Order Granting  
4 Appellee's Motion to Dismiss Appeal as Moot and the final Judgment entered in this action on  
5 May 27, 2008 (Doc Nos. 19 and 20, respectively), and from any and all judgments, orders,  
6 decisions and rulings wholly or partly adverse to Claimant-Appellant merged into that Judgment.  
7 True and correct copies of Doc Nos. 20 and 19 are attached hereto as Exhibits A and B,  
8 respectively. This appeal is made to the United States Court of Appeals for the Ninth Circuit.

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10 Dated: June 11, 2008

Respectfully submitted,

11 SQUIRE, SANDERS & DEMPSEY L.L.P.

12 By: \_\_\_\_\_

13 Daniel T. Balmat

14 Attorneys for Claimant-Appellant  
15 ALPHAMED PHARMACEUTICALS CORP.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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ALPHAMED PHARMACEUTICALS CORP., No. C 08-1279 SI

Claimant-Appellant,

v.

**ORDER GRANTING APPELLEE'S  
MOTION TO DISMISS APPEAL AS  
MOOT**

ARRIVA PHARMACEUTICALS, INC.,

Debtor-Appellee.

On May 23, 2008, the Court heard argument on appellee's motion to dismiss this appeal as moot. After consideration of the parties' papers and the arguments of counsel, the Court hereby GRANTS the motion and DISMISSES the appeal.

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**BACKGROUND**

AlphaMed appeals a final order of the United States Bankruptcy Court for the Northern District of California confirming Arriva's Fourth Amended Plan of Reorganization (the "Reorganization Plan" or "Plan").<sup>1</sup> On August 29, 2007, Arriva filed its Chapter 11 bankruptcy petition. In October 2007,

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<sup>1</sup> This bankruptcy appeal is the latest in a number of lawsuits between Alphamed, Arriva, and individuals involved with both corporations; these lawsuits include (1) a 1999 case filed in Arizona state court by one of the founders of Arriva, Dr. Allan Wachter against AlphaMed's founder, John Lezdey, Lezdey's wife and sons, and others, regarding the ownership of a patent license; (2) a 1999 lawsuit filed by Arriva in this Court, which was stayed during the pendency of the Arizona litigation; (3) a 2003 lawsuit filed by AlphaMed in Florida district court, which resulted in a \$78 million jury verdict in favor of AlphaMed; the court entered judgment as a matter of law in favor of Arriva, and the case is now on appeal in the Eleventh Circuit; and (4) a 2007 lawsuit filed by John Lezdey in Nevada state court, which was automatically stayed due to Arriva's bankruptcy case. In addition to the instant bankruptcy appeal, Alphamed has filed four other appeals of Arriva's bankruptcy proceedings; all five bankruptcy appeals are pending in this Court.

1 AlphaMed filed an adversary complaint in the Bankruptcy Court; that complaint sought a determination  
2 that a license to a patent was not the property of the estate. In an order dated January 11, 2008, the  
3 Bankruptcy Court dismissed AlphaMed's complaint with prejudice on the ground that AlphaMed lacked  
4 standing to seek declaratory relief. AlphaMed also filed a proof of claim in the amount of \$78 million,  
5 which was the amount of the vacated Florida jury verdict referenced in footnote 1 *supra*. The  
6 Bankruptcy Court disallowed the claim based upon the Florida court's entry of judgment as a matter of  
7 law. AlphaMed has appealed both of these rulings to this Court; neither of those appeals is the instant  
8 appeal.

9 On December 12, 2007, Arriva filed its Reorganization Plan. On January 8, 2008, AlphaMed  
10 filed an objection to the confirmation of the Plan. On January 16 and 17, 2008, the Bankruptcy Court  
11 held a full trial on plan confirmation, during which attorneys for Arriva and AlphaMed examined two  
12 witnesses. Preston Decl. ¶ 5. Arriva's Plan received 100% approval from the voting creditors. *Id.* On  
13 January 30, 2008, the Bankruptcy Court entered the Order Confirming Debtor's Fourth Amended  
14 Chapter 11 Plan of Reorganization. *Id.* Ex. C. The Plan expressly addresses the possibility that the  
15 Eleventh Circuit will reverse the Florida district court's order granting judgment as a matter of law to  
16 Arriva. The Plan establishes a reserve for disputed claims, including AlphaMed's claim presently on  
17 appeal to the Eleventh Circuit. In confirming the Plan, the Bankruptcy Court found, "[s]uch a reserve  
18 will enable the Debtor to perform its duties under the Plan [as to division of funds for creditors] in the  
19 event of a successful appeal by AlphaMed in the Eleventh Circuit." Opposition, Ex. L. On February  
20 7, 2008, AlphaMed appealed the Plan Confirmation Order; this is the appeal presently before the Court.  
21 AlphaMed did not seek a stay of the Plan Confirmation Order from any court.

22 On February 13, 2008, Arriva completed the steps necessary to become a newly reorganized  
23 company. Arriva took the following actions: (1) drew down on a \$6 million line of credit provided by  
24 two lenders, Nordic and MPM; (2) paid to Nordic and MPM loan principal in the amount of \$1.5  
25 million, as well as over \$40,000 in accrued loan interest; (3) filed new Articles of Incorporation with  
26 the California Secretary of State and adopted new bylaws; (4) created a new investor's rights agreement  
27 with an eye to making an initial public offering; (5) rescinded shares of old common and preferred stock,  
28 and issued new common and preferred stock to 5 entities; (6) secured a settlement with 12 companies

1 and individuals, who withdrew their claims (totaling more than \$31.8 million) filed in Bankruptcy  
2 Court; (7) assumed a contract with QSV Biologics, binding Arriva and QSV to continue reciprocal  
3 performance of an existing contract, and paid a cure amount of \$273,000 to QSV and other amounts for  
4 services rendered; (8) assumed 40 executory contracts Arriva had entered into prior to filing for  
5 bankruptcy; under those contracts, Arriva and the companies agreed to continue their reciprocal  
6 performance just as they had done before Arriva filed for bankruptcy; (9) paid for director's and  
7 officer's insurance; (10) funded a pot of \$776,000 from which creditors will eventually recover their  
8 claims, and have paid out a small percentage to creditors; (11) received by assignment from Dr. Wachter  
9 his interest in the Arizona judgment (according to Arriva, this judgment was initially worth \$17 million  
10 and but has now become an asset of Arriva); and (12) sent notice to more than 200 entities and  
11 individuals of Arriva's new status as a reorganized company. In addition, Nordic created a corporate  
12 entity in the Netherlands, named Arriva Pharmaceuticals, B.V., to support the funding of Arriva.

#### DISCUSSION

15 Arriva moves to dismiss this appeal as both equitably and constitutionally moot. The arguments  
16 under both mootness doctrines are similar. Essentially, Arriva contends that because AlphaMed never  
17 sought a stay of the Bankruptcy Court's order confirming the Plan, the Plan has become effective, which  
18 has resulted in a comprehensive change of circumstances such that it would be inequitable for the Court  
19 to consider AlphaMed's appeal on the merits. Arriva also argues that as a result of the implementation  
20 of the Plan, the Court is "powerless to undo what has already been done," and there is no effective relief  
21 that the Court could provide.

22 Arriva relies primarily on *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981). In that case,  
23 the Ninth Circuit affirmed a district court's dismissal of a bankruptcy appeal as moot. "Appellants have  
24 failed and neglected diligently to pursue their available remedies to obtain a stay of the objectionable  
25 orders of the Bankruptcy Court and have permitted such a comprehensive change of circumstances to  
26 occur as to render it inequitable for this court to consider the merits of the appeal." *Id.* at 798. The court  
27 noted that the appellant had provided no explanation for the failure to seek a stay, and that the Trustee  
28 had implemented the bankruptcy plan for many months, taking such steps as liquidating and

1 reorganizing the debtor corporation, and had engaged in a number of financial and property transactions.

2 The court explained the rationale for the equitable mootness doctrine:

3 Admittedly, the principle of dismissal of an appeal for lack of equity applied in this case  
4 places a heavy burden on aggrieved party-appellants in bankruptcy cases. It is justified  
5 to prevent frustration of orderly administration of estates under various provisions of the  
Bankruptcy Act. If an appellant fails to obtain a stay after exhausting all appropriate  
remedies, that may well be the end of his appeal.

6 *Id.*; see also *In re Focus Media*, 378 F.3d 916, 922-23 (9th Cir. 2004) (discussing equitable and  
7 constitutional mootness).

8 Arriva argues that there has been a “comprehensive change of circumstances” because Arriva  
9 has brought the Plan to “substantial consummation” as that term is defined in the Bankruptcy Code. The  
10 Bankruptcy Code defines substantial consummation as:

- 11 (A) a transfer of all or substantially all of the property proposed by the plan to be  
12 transferred;  
13 (B) an assumption by the debtor . . . under the plan of the business or management of all or  
substantially all of the property dealt with by the plan; and  
14 (C) commencement or distribution under the plan.

15 11 U.S.C. § 1101(2). Arriva has filed supporting declarations detailing all of the steps that the  
16 corporation has taken to implement the Plan. See Preston Decl.; Preston Reply Decl.

17 The Court finds that Arriva has demonstrated “substantial consummation,” and that the appeal  
18 should be dismissed as moot. The Court finds it significant that AlphaMed does not provide any  
19 explanation for its failure to seek a stay, nor does AlphaMed dispute that the Plan has been  
20 implemented. Instead, AlphaMed devotes a significant portion of its brief to arguing the merits of its  
21 appeal. However, these arguments are misplaced as the Court must first address the threshold question  
22 of mootness. AlphaMed also asserts that although the Plan has been implemented, the Plan is a  
23 relatively simple one, and that the Court could fashion effective relief. However, AlphaMed does not  
24 explain *how* the Court could provide relief that would not disturb Arriva’s reorganization and the  
25 numerous third parties who have been involved and affected by the Plan implementation. The Court  
26 also finds that any prejudice to AlphaMed as a result of this dismissal is minimal in light of the other  
27 four pending appeals that AlphaMed has filed arising out of the Arriva bankruptcy proceedings. Those  
28 appeals all involve the same central issue, namely the ownership of the patent license, and whether that

1 license should be considered part of Arriva's estate.

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3 **CONCLUSION**

4 For the foregoing reasons and for good cause shown, the Court hereby GRANTS appellant's  
5 motion to dismiss the appeal. (Docket No. 4).

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7 **IT IS SO ORDERED.**

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9 Dated: May 27, 2008

*Susan Illston*

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11 SUSAN ILLSTON  
12 United States District Judge

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Court Name: U.S. District Court, NDCA  
Division: 3  
Receipt Number: 34611020118  
Cashier ID: bucklem  
Transaction Date: 06/11/2008  
Payer Name: squire sanders and dempsey

NOTICE OF APPEAL/DOCKETING FEE  
For: alphamed pharmaceutical  
Case/Party: D-CAN-3-08-CV-001279-001  
Amount: \$455.00

CHECK

Check/Money Order Num: 2432  
Amt Tendered: \$455.00

Total Due: \$455.00  
Total Tendered: \$455.00  
Change Amt: \$0.00

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Checks and drafts are accepted  
subject to collections and full  
credit will only be given when the  
check or draft has been accepted by  
the financial institution on which  
it was drawn.